

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

NICOLAS ROLOVICH,
Plaintiff,

v.

WASHINGTON STATE
UNIVERSITY, an agency of the State
of Washington.

Defendant.

CASE NO: 2:22-CV-00319-TOR

**JOINT STATUS REPORT AND
DISCOVERY PLAN**

Plaintiff Nicholas Rolovich and Defendant Washington State University submit the following Joint Status Report and Discovery Plan.

A. Jurisdiction and Venue

Defendant asserts that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) (diversity of citizenship), § 1331 (as to Plaintiff's federal law claim), and § 1367(a) (as to Plaintiff's state law claims). Defendant further asserts that venue is proper in this Court under 28 U.S.C. § 1391. Plaintiff moved to remand to

1 state court and this Court denied Plaintiff's motion to remand the case. Plaintiff
2 reserves the right to appeal this denial of his request to remand.

3 **B. Service of Process**

4 Service of process is complete.

5 **C. Brief Description of the Claims and Defenses**

6 The parties hereby excerpt the following description of factual background
7 contained in the Court's Order granting in part and denying in part Defendant's
8 Motion to Dismiss, ECF No. 33. In so doing, the Parties do not waive any points of
9 dispute they may have with the following characterization of the Court:

10 This matter relates to the termination of Plaintiff's employment from Washington
11 State University (WSU). Plaintiff Nicholas Rolovich was the head football coach for
12 WSU from January 14, 2020, until his employment was terminated on December 6,
13 2021. WSU is an agency of the State of Washington, located in Pullman, Washington.
14 Patrick Chun is the Athletics Director for WSU.

15 The Governor issued Proclamation 21-14 on August 20, 2021, which required all
16 applicable state employees to be fully vaccinated against COVID-19 by October 18,
17 2021. Thereafter, WSU established a new, two-step process for employee exemption
18 requests. At the first step, the employee's exemption application was reviewed by a
19 committee who did not know the employee's identity. If the exemption was approved,
20 the request moved to the second step where a determination was made regarding the

1 employee's ability to safely perform the duties of his or her job without risking the
2 health and safety of the community.

3 On October 18, 2021, HR notified Plaintiff that his religious exemption request
4 would not be approved. The notice indicated there were questions about the timing of
5 Plaintiff's asserted religious beliefs and that Plaintiff's accommodations would create
6 an undue hardship to WSU. That same day, Plaintiff received a Notice of Intent to
7 Terminate with Just Cause from Chun. Plaintiff appealed the termination to WSU
8 President Kirk Schulz in accordance with the procedures outlined in his employment
9 contract. President Schulz ultimately denied the appeal, which became the final
10 decision of WSU, on December 6, 2021.

11 Plaintiff describes his claims as follows:

- 12 • Breach of Contract: Breach of Implied Covenant of Good Faith and Fair
13 Dealing. Defendant breached its contract with Plaintiff by terminating him
14 without just cause and refusing to pay out the liquidated damages required
15 pursuant to the contract.
- 16 • Violation of Washington Law Against Discrimination, RCW 49.60 *et seq.*
17 A substantial factor in Defendant's decision to terminate Plaintiff was
18 Plaintiff's sincerely held religious belief that precluded him from being
19 vaccinated.

- Wrongful withholding of wages pursuant to RCW 49.52 *et seq.* and RCW 49.48.010. Defendant's breach of its contract with Plaintiff by terminating him for "just cause" and withholding the liquidated damages owed to Plaintiff constituted a wrongful withholding of wages.
- Violation of Title VII, 42 U.S.C. § 2000e *et seq.* Defendant failed to provide any accommodation. Undue hardship is not a complete defense to this claim because undue hardship cannot provide a complete defense to a failure to accommodate claim when an employer's desire to avoid accommodation is a motivating factor as it was for Defendant.

Defendant describes its defenses as follows:

- As to Plaintiff's Title VII and WLAD claims, Defendant is not liable because, *inter alia*: (1) Plaintiff's opposition to the COVID-19 vaccines was based on his essentially political, ideological, or pseudo-scientific opinions rather than a sincerely held religious belief; (2) Defendant could not have accommodated Plaintiff without experiencing an undue hardship; and (3) Plaintiff's sincerely held religious beliefs were not a motivating factor in Defendant's decision to terminate his employment, which was based solely on legitimate, nondiscriminatory reasons.

- As to Plaintiff's claim for breach of contract and breach of the implied covenant of good faith and fair dealing, Defendant is not liable because it had just cause to terminate Plaintiff's employment.
- As to Plaintiff's purported claim for "[w]rongful withholding of wages pursuant to RCW 49.52 *et seq.* and RCW 49.48.010," Defendant is not liable because the First Amended Complaint pleads no such claim, which is in any event derivative of—and fails for the same reasons as—Plaintiff's breach of contract claim, and otherwise fails as a matter of law.

D. Whether a Statute's Constitutionality Is Being Challenged

Plaintiff does not challenge the constitutionality of any statute.

E. Whether any issues should be certified to a state supreme court

The Parties do not believe that any issues pertinent to Plaintiff's state law claims should be certified to the Washington Supreme Court.

F. Suggested deadline for adding additional parties, amending the pleadings, and seeking class certification

The Parties suggest a deadline of September 29, 2023, for adding additional parties, amending the pleadings, and seeking class certification.

G. Ownership Statement of Non-Governmental Corporate Parties

No non-governmental corporate entities are parties to this case.

H. Minor or Incompetent Party and Guardian ad Litem

No minor or incompetent party is involved in this case.

I. Discovery

1. Confirmation initial disclosures will be accomplished by the hearing

The Parties confirm that they will serve initial disclosures on or before the deadline of August 2, 2023.

2. Subjects on which discovery may be needed

Plaintiff anticipates seeking discovery on the following subjects, among others:

1. Data relied upon and/or made available to WSU regarding the effectiveness of the Covid vaccines and potential side effects and the feasibility and efficacy of preventative measures other than vaccination.

2. WSU communications discussing the efficacy and the potential side effects of the Covid vaccines.

3. The development and implementation of WSU's policies and procedures for evaluation of vaccination exemption requests, including communications by and among President Kirk Schulz, AD Patrick Chun, Bryan Blair, other WSU officials and personnel, and government personnel regarding making religious exemptions as narrow as possible.

4. Communications by or among any WSU personnel (including President Kirk Schulz, AD Patrick Chun, Bryan Blair, other WSU officials) the COVID-19 vaccination requirement and the exemption process, and/or Mr. Rolovich.

5. Internal discussions and deliberations by WSU, and discussions and deliberations by WSU with any other individual or governmental or private entity, regarding Mr. Rolovich's vaccination status and request for a religious exemption and accommodation from the COVID-19 vaccination requirement, including

a. the "blind review" sincerity determination by HRS,

b. the accommodation review step,

c. discussions and communications by Athletic Department personnel, President Schulz, WSU Board of Regents, donors/supporters following

1 HRS's initial determination that Rolovich's religious beliefs were
2 sincere

3 d. all communications within the Athletic Department re Rolovich's
4 exemption request,

5 e. EH&S's proposed accommodations and internal discussions re
6 proposed accommodations,

7 f. EH&S's October 14, 2021 memorandum re proposed accommodations
8 for Mr. Rolovich

9 g. WSU's determination that making an accommodation would result in
10 undue hardship

11 6. Communications between WSU and media personnel or members of the
12 public regarding Mr. Rolovich, his employment or termination, Governor Insee's
13 proclamation/the COVID-19 vaccination requirement and exemptions to the
14 vaccination requirement

15 7. Facts and circumstances regarding how other requests for medical and
16 religious exemption by WSU personnel were evaluated and resolved

17 8. Communications and interactions with WSU donors and boosters and the
18 impact of Mr. Rolovich's vaccination status on donor commitments and/or any other
19 concerns expressed.

20 9. Facts, circumstances, and communications surrounding WSU athletic
21 coaches' contracts and amendments thereto in 2020-2021, including the added
22 provision that such coaches must "follow all federal, state, and local health directives,
as well as university policies related to health and safety."

10. Facts and circumstances surrounding Mr. Rolovich's termination,
including all internal deliberations and discussions regarding his job performance,
contract, salary and liquidated damages, vaccination status, objections to the
vaccination, and mental health

11. WSU's attempts to track or monitor Mr. Rolovich's online and social
media activity

12. Facts and circumstances surrounding other terminations of employment by
WSU,

1 13. The job requirements and performance benchmarks for the WSU football
head coach position.

2 14. Communications and documents discussing or reflecting the estimated
3 actual cost to WSU to accommodate Rolovich per EHS's recommendations only.

4 15. Communications and deliberations regarding Patrick Chun's alleged
violations of WSU, University of Idaho, and Arizona State University COVID-19
5 protocols, in addition to any disciplinary action discussed or considered by WSU
regarding the foregoing.

6 16. Communications regarding disciplinary action considered or taken by
7 WSU against Patrick Chun, including without limitation the incident where Mr. Chun
was trespassed from the business of Pullman City Councilman Al Sorensen.

8 Defendant anticipates seeking discovery on the following subjects, among others:
9 (a) the claims and allegations in Plaintiff's Amended Complaint; (b) Plaintiff's beliefs,
10 statements, communications, and actions regarding COVID-19, including the COVID-
11 19 vaccines; (c) Plaintiff's religious beliefs and practices, including as they relate to
12 the COVID-19 vaccines; (d) Plaintiff's employment history and job performance;
13 (e) Plaintiff's communications, interactions, and relationships with WSU employees,
14 players, donors, and others in 2020 and 2021; (f) Plaintiff's role as head football coach
15 at WSU, including the duties, responsibilities, and functions involved (g) Plaintiff's
16 request for a religious exemption and accommodation from the COVID-19 vaccination
17 requirement; (h) Plaintiff's alleged damages, including any efforts to mitigate them;
18 and (i) the risks, costs, implications, and impacts of allowing Plaintiff to remain in the
19 head football coach position unvaccinated, including the hardship to the conduct of
20 Defendant's business.

3. Preserving discoverable information, including ESI

The Parties do not anticipate any issues related to preserving discoverable information, including electronically stored information (“ESI”). When ESI is responsive to a discovery request or appropriately the subject of mandatory disclosure, the Parties agree that responsive ESI will be provided consistent with the Model Protocol.

4. Claims of privilege, protection of confidentiality, and proposed confidentiality agreements

The Parties have discussed concerns related to privilege, confidentiality, and related issues. The Parties do not anticipate any unique privilege or confidentiality issues arising.

5. Proposed agreements reached under Fed. R. Evid. 502

Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection, if (i) such information appears on its face to have been inadvertently produced, or (ii) the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

6. Proposed modifications to the standard discovery procedures, including bifurcation and/or consolidation of discovery, or an increase in the allowed number of depositions (10), interrogatories (25), requests for production (30), or requests for admission (15);

The Parties propose the following modifications to the standard discovery limitations: 20 depositions (10 of 7-hour duration, 10 of 3-hour duration), 30 interrogatories, and 35 requests for production.

7. Suggested expert disclosure deadlines; and

The Parties suggest an expert disclosure deadline of March 8, 2024, and a rebuttal expert disclosure deadline of April 12, 2024.

8. Suggested discovery cut-off

The Parties suggest a discovery cut-off of May 24, 2024.

J. Anticipated motions and suggested dispositive motion filing deadlines

Plaintiff anticipates filing a F.R.C.P. motion seeking to correct several factual and legal errors in the Court's Order on Motions to Dismiss issued on May 30, 2023, including the Court's ruling that Plaintiff has abandoned his claim for wrongful withholding of wages pursuant to RCW 49.52 *et seq.* and RCW 49.48.010 and several other issues. Plaintiff also anticipates filing a motion for summary judgment as to all claims and pretrial motions in limine

Defendant anticipates filing a motion for summary judgment as to all claims and motions in limine. The Parties suggest a dispositive motions deadline of July 1, 2024.

K. Trial

1. Whether a jury has been requested. In cases removed from state court in which a party desires a jury trial, a jury demand must be filed within 30 days after removal, see LCivR 38(d);

Plaintiff has requested a jury trial.

2. Suggested trial date(s) and location;

Plaintiff suggests a trial start date between September 1 and November 11, 2024.

Defendant suggests a trial date of February 24, 2025, in Spokane.

3. Anticipated length of trial;

The Parties anticipate that trial would last 10 days.

4. Requests for bifurcation

The Parties do not request bifurcation of trial.

5. The need for special audio/visual courtroom technology

The Parties do not anticipate a need for special audio/visual courtroom technology.

L. The likelihood for settlement and the point at which the parties can conduct meaningful dispute resolution

The Parties have met and conferred regarding dispute resolution and presently believe settlement is unlikely, but meaningful dispute resolution can be conducted at the close of discovery.

M. Any other matters that may be conducive to the just, speedy, and inexpensive determination of the action.

In light of the rules against piecemeal appeals, Plaintiff notes that it reserves the right, upon entry of a final judgment, to appeal the dismissal of his claims against dismissed Defendant Patrick Chun.”

IT IS SO AGREED, THROUGH COUNSEL OF RECORD.

DATED this 26th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2023, I electronically filed the forgoing document to the Clerk of Court using the ECF System for filing.

By: s/ Erica Knerr
Erica Knerr, Legal Assistant